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IN THE

Supreme Court of the United States

October Term, 1964

No. 95

VICTOR LINKLETTER,

Petitioner,

vs.

VICTOR G. WALKER, Warden of Louisiana State Penitentiary, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

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BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

Questions Presented

1. Do prisoners presently in custody pursuant to criminal judgments that were considered final before the decision in *Mapp* v. *Ohio* have a constitutional right to have their cases reviewed on the basis of *Mapp*?

2. Does every change in conceptions of fundamental constitutional rights entail a fundamental right to re-examination of previously closed cases to determine whether the newly defined right was accorded in the past?

Interest of *Amicus*

The National District Attorneys Association is an interstate organization of local prosecutors, devoted to improving the quality of law enforcement in the states. The questions presented in the instant case have been answered in the negative by every state court that has treated them, and the Association believes that overturning these decisions would needlessly and harmfully disrupt the administration of justice throughout the nation. Accordingly, the Association files the instant brief, with the consent of the parties; another brief, identical in material respects, will be filed in the companion case, *Angelet* v. *Fay*, No. 578, October Term, 1964. Pursuant to the gracious permission of the Court and consent of the parties, counsel representing *amicus* will present oral argument on behalf of respondent in the instant case, and in *Angelet*.

Summary of Argument

The evolution of the exclusionary rule of *Mapp* v. *Ohio* [367 U. S. 643 (1961)] is dramatic proof of Holmes's teaching that change is the law of life and the life of the law. In two decades, the exclusion of unlawfully seized evidence was transformed from a judge-made rule of evidence, freely adopted by some states, into a basic right, binding on all states by authority of the Fourth Amendment. This metamorphosis into a right now deemed "fundamental" to criminal justice does not, however, imply a "fundamental right" to reopen cases that were disposed of at an earlier state of the development. It is false to conceive of a new right, declared in a case that overrules a prior decision, as always existing. Further, the history of the exclusion-

ary rule up to the decision in *Mapp* v. *Ohio* shows that the prospect of retroactivity played no part in the evolution of the rule, and would have inhibited that development. Unanimous state holdings after *Mapp*, supported by decisions in the great majority of the federal circuits, demonstrate that the retroactivity sought by petitioner is not deemed basic to our concepts of justice, and that continuing the incarceration of pre-*Mapp* prisoners without reexamining their cases is not "custody in violation of the Constitution" [see 28 U. S. C. §2241].

Moreover, absent here are the reasons for adopting retroactivity in situations in which new constitutional rights have been applied to previously closed cases, such as the right to perfect an appeal regardless of indigency, to have counsel at trial, and to challenge a confession in the absence of the jury. The reasoning of those decisions forbids present reliance on the validity of prior judgments. In each instance, unlike *Mapp*, the defendant never had a fair trial of issues that were always in the case, including guilt or innocence, and deprivation of constitutional rights that were announced prior to trial. By vacating the judgment, fair trial can be restored. However, the object of the *Mapp* decision, past police misconduct, cannot be corrected by retroactivity. In short, constitutional principles leave this Court a choice whether to apply *Mapp* retroactively.

This choice should be determined by the effects of such a holding. Serious harms to the administration of justice, to the detriment of defendants with more important interests, counsel against retrospective application of *Mapp*.

The evils of retroactivity derive from its enormous scope, and the complexity of the procedures for its implementation. Countless past cases would be subject to cumbersome re-examination; in states that had no exclusionary rule before *Mapp*, in states whose application of exclusion differed from present federal standards, and in the federal jurisdiction. A requirement of reviewing these thousands of cases to determine whether the subsequently announced right of exclusion was "violated" would place an intolerable burden on the improving administration of justice. At a time when the attention of judges, defense lawyers, police, and prosecutors is turned to the urgent present and future application of the profound recent changes in criminal law, retroactivity of *Mapp* would interfere with these important tasks by requiring review of less pressing claims.

Retroactivity of the exclusionary rule, imposed because of the false assumption that any "fundamental" right is retroactive, would also require continuous reopening and re-examination of judgments hereafter, with every future change in the prevailing interpretation of specific "fundamental" Fourth Amendment rights. The continuing evolution of the content of the Fourth Amendment, of which the development of the exclusionary rule is only one aspect, would be impaired by the introduction of this extraneous factor. Pragmatic, day-to-day examinations of the many open constitutional questions that remain in the field of search and seizure should not be inhibited by the unsettling prospect of automatic application of new standards to previously closed cases.

ARGUMENT

There is no absolute right to retroactive application of constitutional decisions. In judging whether *Mapp* v. *Ohio* is retroactive, the Court should consider that reopening and re-examining countless closed cases to determine at which past trials unlawfully seized evidence was elicited would impair the administration of justice, now and in the future, to the detriment of other defendants with more urgent claims.

A. Constitutional Doctrines Leave This Court a Choice Whether to Apply *Mapp* Retroactively.

1. The evolution of the exclusionary rule into a constitutional right shows that a new fundamental right is distinct from an alleged "fundamental right" to reopen previously closed cases thereunder.

The issue in this case is whether *Mapp* v. *Ohio* [367 U. S. 643 (1961)] is "retroactive": whether because of *Mapp* "closed" cases, in which the judgments of guilt were rendered and the appeal exhausted before the date of the *Mapp* decision, must now be reopened, and examined under current Fourth Amendment principles. Thus, the concept of retroactivity involved here does not include the relatively few cases in which the judgment of conviction was rendered before, but review on appeal was pending or available at the time of, the *Mapp* decision. In such cases, *Mapp* has universally been held to govern, pursuant to the practice of applying newly declared law to matters that are still in the appellate process [see *United States ex rel. Carafas* v. *LaVallee*, 334 F. 2d 331 (2d Cir. 1964), *appeal pending; United States ex rel. Campbell* v. *Rundle*, 327

F. 2d 153 (3rd Cir. 1964); *Thompson* v. *State*, 132 So. 2d 386 (Ala. 1961); *State* v. *Hanna*, 191 A. 2d 124 (Conn. 1963); *State* v. *Del Vecchio*, 182 A. 2d 402 (Conn. 1962); *State* v. *Nelson*, 196 A. 2d 52 (N. H. 1963); *State* v. *Pina*, 383 P. 2d 167 (Ariz. 1963); *Commonwealth* v. *Spofford*, 180 N. E. 2d 673 (Mass. 1962); *Commonwealth* v. *Jacobs*, 191 N. E. 2d 873 (Mass. 1963)], although certain appellate courts, including this Court, require adequate objection or other fact on the record to preserve the question for review [see *Ker* v. *California*, 374 U. S. 23 (1963); *Stoner* v. *California*, 376 U. S. 483 (1964); *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *People* v. *Loria*, 129 N. E. 2d 478 (N. Y. 1961); *People* v. *Friola*, 182 N. E. 2d 100 (N. Y. 1962); *State* v. *Valentin*, 174 A. 2d 737 (N. J. 1961); *State* v. *Smith*, 181 A. 2d 761 (N. J. 1962), *cert. denied* 374 U. S. 835 (1963); *Belton* v. *State*, 178 A. 2d 409 (Md. 1962); *Shorey* v. *State*, 177 A. 2d 245 (Md. 1962), *cert. denied* 371 U. S. 928 (1962); *Commonwealth* v. *Raymond*, 194 A. 2d 150 (Pa. 1963); *Commonwealth* v. *Richards*, 182 A. 2d 291 (Pa. Super. 1963); *Ewing* v. *State*, 116 N. W. 2d 7 (Neb. 1962); *cert. denied* 375 U. S. 876 (1963)]. The decision whether *Mapp* should apply to previously closed cases, on the other hand, involves far more complex and challenging questions as to the meaning of the judicial process.

As the decisions below and respondents' briefs in this case and *Angelet* v. *Fay*, No. 578, October Term, 1964, demonstrate, the issues cannot be disposed of by a simple holding that *all* constitutional decisions that overrule prior cases are retroactive. It would be meaningless to declare that the new constitutional right of exclusion that was promulgated for the first time in 1961 in *Mapp* always ex-

isted, notwithstanding the express holding to the contrary in 1949 in *Wolf* v. *Colorado* [338 U. S. 25 (1949)]. Similarly, it would be a distortion of the development of the exclusionary rule into a constitutional right to conclude that the status of "basic" right automatically means retroactivity. The following review of the emergence of the constitutional rule of exclusion shows that the growing perception of a need for a particular right in present criminal procedure is distinct from a felt necessity of reopening old cases because of the change in standards.

The exclusion of unlawfully seized evidence was introduced to American jurisprudence in Iowa [*State* v. *Sheridan*, 96 N. W. 730 (Ia. 1903)], and several years later this Court applied the rule to federal courts [*Weeks* v. *United States*, 232 U. S. 383 (1914)]. Thereafter, while Iowa abandoned the rule, and twenty-eight other states expressly rejected it, eighteen voluntarily adopted exclusion [see appendix in *Wolf* v. *Colorado*, 338 U. S. 25, 33-39 (1949)]. Thirty-five years after *Weeks*, in *Wolf* v. *Colorado*, the Court held that the Fourteenth Amendment makes binding on the states the right to privacy that is at the "core" of the Fourth Amendment, but the Court's survey of the state decisions, and the availability of other remedies, convinced the Court that exclusion was not "basic to a free society." Eleven years later, however, in *Elkins* v. *United States* [364 U. S. 206 (1960)], the Court's new census of state decisions showed that several states had adopted the rule after *Wolf* [*id.* at 218-221, 224-234 (1960)], and that the "movement towards the rule of exclusion has been halting but seemingly inexorable" [*id.* at 219]. This rationale contributed to the overruling of the "silver platter" doctrine in *Elkins*. The evolution of the exclusionary rule

was completed the next year; in *Mapp* v. *Ohio*, the Court referred extensively to *Elkins* and the shift in state law, and concluded that the "factual considerations" in *Wolf* were now absent [367 U. S. at 651-653, 660], and that exclusion was now fundamental to American criminal procedure.

It is questionable whether the "impressive," "inexorable" experience of the states [see *Elkins* v. *United States*, *supra* at 218-219] that adopted exclusion would have occurred if the state courts and legislatures had contemplated that by contributing to the "fundamental" quality of the rule they would support the drastic requirement, proposed by petitioner here, that all past cases be reopened for scrutiny under the new right. California, whose adoption of the *Weeks* rule in 1955 was cited by this Court in *Mapp* as evidence of its necessity [367 U. S. at 652], might have decided otherwise, since the California exclusionary rule was not applied retrospectively [see *Collins* v. *Webb*, 133 F. Supp. 877 (N. D. Cal. 1955); *People* v. *Martinez*, 302 P. 2d 643 (Cal. App. 1956)]. Similarly, the statutory rule enacted in Rhode Island, which this Court referred to as part of the "significant" experience of the states, was limited to prospective operation [see *State* v. *Hillman*, 125 A. 2d 94 (R. I. 1956)]. Further, *Mapp* itself was uniformly denied retroactivity by the state courts, including those that voluntarily adopted exclusionary rules before *Mapp*.

The retroactivity proposed in the instant case was rejected by all of the state courts that passed upon the issue, the court below, and most of the other circuit courts [see *Angelet* v. *Fay*, 333 F. 2d 12 (2d Cir. 1964), *appeal pending* No. 578, Oct. Term, 1964; *Linkletter* v. *Walker*,

323 F. 2d 11 (5th Cir. 1963), *appeal pending* No. 95; Oct. Term, 1964; *Reynolds* v. *United States*, 324 F. 2d 371 (5th Cir. 1963); *Sisk* v. *Lane*, 331 F. 2d 235 (7th Cir. 1964); *Gaitan* v. *United States*, 317 F. 2d 494 (10th Cir. 1963); *McLester* v. *United States*, 306 F. 2d 880 (10th Cir. 1962); *Petition of Dirring*, 183 N. E. 2d 300 (Mass. 1962); *State* v. *Beltowski*, 123 N. W. 2d 207 (Minn. 1963), *cert. denied* 375 U. S. 947 (1963); *People* v. *Muller*, 182 N. E. 2d 99 (N. Y. 1962), *cert. denied* 371 U. S. 850 (1962); *Taylor* v. *People*, 392 P. 2d 294 (Colo. 1964); *Commonwealth ex rel. Wilson* v. *Rundle*, 194 A. 2d 143 (Pa. 1963); *Commonwealth ex rel. Altizer* v. *Hendricks*, 190 A. 2d 348 (Pa. Super. 1963); *Saulsbury* v. *Green*, 195 N. E. 2d 787 (Ohio 1964); *Villasino* v. *Maxwell*, 190 N. E. 2d 265 (Ohio 1963); *Spence* v. *Sacks*, 183 N. E. 2d 363 (Ohio 1962); *Moore* v. *State*, 146 So. 2d 734 (Ala. 1962), *cert. denied* 374 U. S. 811 (1963); *State* v. *Smith*, 202 A. 2d 669 (N. J. 1964); see *In re Harris*, 366 P. 2d 305, 309 (Cal. 1961) (TRAYNOR, J., concurring), *vac. other grounds* 374 U. S. 499 (1963); *People* v. *Martinez*, 302 P. 2d 643 (Cal. App. 1956); *State* v. *Hillman*, 125 A. 2d 94 (R. I. 1956); *contra*: *Hall* v. *Warden*, 313 F. 2d 483 (4th Cir. 1963), *cert. denied* 374 U. S. 809 (1963); *Walker* v. *Peppersack*, 316 F. 2d 119 (4th Cir. 1963); *California* v. *Hurst*, 325 F. 2d 891 (9th Cir. 1963), *appeal pending* No. 45, Oct. Term, 1964]. As is noted in the decision below and respondents' brief (pp. 2, 4), the thoughtful analysis of most commentators also rejects retroactivity of *Mapp*. This overwhelming judicial and scholarly experience shows that while the *Mapp* rule is now deemed basic to present cases, continuing undisturbed the validity of pre-*Mapp* judgments, and the imprisonment of pre-*Mapp* defendants, is not considered "custody in violation of the Constitution"

[see 28 U. S. C. §2241] or "in violation of fundamental law" [see *Fay* v. *Noia*, 372 U. S. 391, 83 S. Ct. 822, 829, 832, 834, 842, 846, 849 (1963)]. Petitioner's use of the word "fundamental" to combine the two entirely separate concepts (brief, pp. 16, 24, 26, 27) obscures the distinction, and should not be enshrined in the decisions of this Court.

2. *The exclusionary rule is distinguishable from other newly announced constitutional rights that were applied retroactively.*

By stressing the vital distinction between the emergence of a fundamental right, and a "right" to have it applied to earlier cases, we do not imply that no constitutional changes should be retroactive. Where appropriate, decisions of this Court have been applied to previously closed cases. But the Court has never held that, as petitioner now argues, in criminal cases all rulings based on the Constitution are, by that same authority, always retrospective, notwithstanding the consequences, and regardless of the policy of the right that is involved. Examination of the situations in which recent constitutional developments have been extended retroactively shows crucial differences from the instant case.

Griffin v. *Illinois* [351 U. S. 12 (1956)], involving the right of an indigent prospective appellant to a transcript, has been applied to prior convictions [see, *e.g.*, *Eskridge* v. *Washington State Board of Parole*, 357 U. S. 214 (1958)]. After *Gideon* v. *Wainwright* [372 U. S. 335 (1963)], this Court reversed a previously closed judgment that was entered without counsel [see *Doughty* v. *Maxwell*, 376 U. S. 202 (1964); see also *United States ex rel. Durocher* v. *La*

Vallee, 330 F. 2d 303 (2d Cir. 1964)]. The voiding on post-conviction collateral attack of the "New York procedure" for determining voluntariness [see *Jackson* v. *Denno*, 378 U. S. 368 (1964)] has been interpreted as implying retroactivity [see *People* v. *Huntley*, 15 N. Y. 2d ——, N. Y. L. Jour. Feb. 5, 1965, p. 4, col. 1 (Jan. 7, 1965); *Butler* v. *Rundle*, —— A. 2d ——, 33 U. S. L. W. 2361 (Pa. 1965)]. In those cases, however, the fundamental unfairness of denying to prior defendants the benefits of newly announced rights is clearer than in the instant situation. The wrongs that were perceived in the former three decisions are, and always were, at the heart of the judgment itself, for they precluded a fair trial of vital issues that were always in the case. As to *Griffin*, the appeal that was denied was "an integral part of the [state] trial system for finally adjudicating the guilt or innocence of a defendant" [351 U. S. at 18]. According to the rationale of *Gideon*, the community has no cause for confidence in the validity of a judgment rendered against a defendant without counsel, whatever the date of conviction. Claims available to a defendant with counsel, including innocence, procedural errors, and violations of previously declared constitutional rights, were effectively denied by the inherently prejudicial absence of an attorney. Similarly, according to the reasoning of *Jackson*, the defendants in prior New York cases never had a fair hearing on their contentions that their confessions were involuntary. Accepting the description of the psychology of jurors that this Court set forth in *Jackson*, this psychological situation obtained before *Jackson*, and the issue of coercion was incapable of fair determination in all pre-*Jackson* cases that used the "New York procedure."

On the other hand, as the decision below pointed out, the essential issue in *Mapp* was not whether the defendant had a fair trial leading to a reliable judgment of conviction, but the necessity of fashioning an effective "deterrent safeguard"; "the purpose of the exclusionary rule 'is to deter' " invasions of privacy from occurring before trial, or even when there is no trial [367 U. S. at 648, 656]. The rights violated in the other three cases can be restored by allowing an appeal, vacating the judgment and supplying counsel, or granting a hearing as to coercion. But the past illegal police practices that would now be alleged on the basis of *Mapp*, even if they could be considered "confirmed" by uncertain attempts to reconstruct forgotten events in these and countless other cases, cannot be corrected. In the minority of cases in which such violations would be established, vacating the judgments would only be a gratuitous form of "compensation," a type of collateral relief hitherto unknown to the Constitution, and inconsistent with this Court's statement in *Mapp* that compensatory remedies are "futile" for protection of Fourth Amendment rights [367 U. S. at 651-652].

Further, it cannot "lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement" [see *Mapp* v. *Ohio*, *supra*, 367 U. S. at 659-660], and that if those defendants' cases had arisen today, the evidence would be unavailable to the police, and inadmissible in court. The opinion in *Mapp* referred to the long history of effective federal justice under the *Weeks* rule, and the adoption of the rule in many states, including California [see *People* v. *Cahan*, 282 P. 2d 905 (Cal. 1955)]. Seven years' experience under the *Cahan* decision in California led its author to conclude that exclusion did not

frustrate law enforcement or obstruct the availability of evidence [see Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 DUKE L. JOUR. 319, 322, 323 (1962)]. This view was reiterated by the Attorney General of California [see letter quoted in Kamisar, *Wolf & Lustig Ten Years Later*, 43 MINN. L. REV. 1083, 1158 (1959)]. An exhaustive study of statistics of arrests and convictions in California under the *Cahan* rule shows no hampering of law enforcement [Kamisar, *Public Safety* v. *Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L., CRIMINAL & POL. SCI. 171, 188-190 (1962)]. Thus, if on the issue of "fairness" prosecutions of pre-*Mapp* prisoners are to be treated as though they had occurred today under the *Mapp* rule, it appears likely that in the great bulk of such cases the evidence would be admissible, and the convictions secure. While the police—as distinguished from the trial court and prosecutor—may have been on notice before *Mapp* that their conduct was unlawful, unlawfulness was not a necessary condition of securing and admitting the evidence. In the instant case, for example, a warrant to search the premises easily could have been obtained. On the other hand, denying a transcript or an attorney to indigent defendants, permitting the jury alone to determine voluntariness, or obtaining a confession that was the product of coercion, could not have taken place without violating the Constitution.

In sum, consistently with constitutional doctrines concerning the nature of individual rights and the role of this Court, the Court may choose not to apply *Mapp* retroactively. In deciding the question, the Court cannot ignore the effects of retroactivity on the judicial process, and the rights of other defendants.

B. Retroactivity Would Place Heavy Burdens on the Administration of Justice.

1. All states would be affected.

If *Mapp* were retroactive, past judgments in every state would be subject to re-examination. Judgments in the twenty-seven states that at the time of *Mapp* had either no exclusionary rule, or a rule inapplicable to the majority of cases [see *Elkins* v. *United States*, 364 U. S. 206, 224-234 (1960)], would of course be affected. Retroactivity would also involve cases in the twenty-three states that adopted comprehensive exclusionary rules before *Mapp* [*ibid.*]. Since all states are now required to apply the same constitutional search-and-seizure standards as the federal courts [*Ker* v. *California*, 374 U. S. 23 (1963)], convicts in the twenty-three pre-*Mapp* "exclusionary" states would be free to allege variations between those states' previous interpretations of the right to privacy, and this Court's current views [see *Sisk* v. *Lane, supra; California* v. *Hurst, supra; Bates* v. *Dickson*, 226 F. Supp. 983 (N. D. Cal. 1964); *People ex rel. Winkle* v. *Bannan*, 125 N. W. 2d 875 (Mich. 1964), *cert. denied* 33 U. S. L. W. 3244 (1965); *Moore* v. *State*, 146 So. 2d 734 (Ala. 1962), *cert. denied* 374 U. S. 811 (1963)]. Even *Wolf* v. *Colorado* held only the "core" of the Fourth Amendment applicable to the states; now, under *Ker*, all the broad federal constitutional principles apply.

2. The number of previously closed state cases to be relitigated would be enormous.

Although it is clear that all states would be affected by retroactivity, the number of previous state cases that would have to be reviewed cannot be estimated. Accuracy requires, preliminarily, knowledge of the number of state prisoners confined at the time of the *Mapp* decision who are still "in custody" [see 28 U. S. C. §2241], and the number of defendants who have been re-imprisoned as multiple offenders since *Mapp* on the basis of at least one pre-*Mapp* conviction. The population of state prisons shortly before the *Mapp* decision, at the end of 1960, was 189,907 [U. S. CENSUS BUREAU, 1963 STATISTICAL ABSTRACT OF THE U.S. 163]; the average sentence of prisoners released from state institutions in 1960 was six years and seven months, and the average time served two years and four months [FEDERAL BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, PRISONERS RELEASED FROM STATE AND FEDERAL INSTITUTIONS (1960)]. Therefore, perhaps a third to a half of pre-*Mapp* state prisoners are still in custody, in prison or on parole.

In addition to the number of pre-*Mapp* prisoners still in custody, the percentage of these defendants whose cases might have involved search-and-seizure questions must be calculated. In what seems to be a very conservative estimate, a judge of a busy New York trial court has concluded from a study of records of pre-*Mapp* cases in his court that an issue of unlawful or unreasonable search "might have been raised" in about 10% [SOBEL, A COMMENT ON THE LAW OF SEARCH AND SEIZURE (1962), quoted in *Angelet* v. *Fay*, No. 578, Oct. Term, 1964, petitioner's brief, pp. 14-

15]. This classification apparently refers to cases in which the defendant may have a claim worthy of careful examination; the percentage of cases in which evidence was produced by a search or seizure must be much greater.

Further, the proportion of search-and-seizure cases may be higher among defendants who are still in custody since 1961 than for pre-*Mapp* prisoners who have been released. The above-cited reports show, for example, that the sentences imposed and time served for narcotics felonies are much higher than the average; in many of these "contraband" cases, the defendants would allege search-and-seizure questions. Also, defendants who declined to acknowledge their guilt, but put the state to the expense of proving it at trial, generally received longer sentences than defendants who pleaded guilty to the same charges; challenges to the use of unlawful evidence would presumably be limited to the former group if *Mapp* were held retroactive, since the latter judgments were based on pleas, not evidence. Thus, while no precise determination can be made of the number of prisoners, presently in custody on the basis of judgments that were considered closed before *Mapp*, who would raise Fourth Amendment claims, there are potentially thousands. The number would be multiplied if past defendants who are no longer in custody were entitled to reopen their cases.

3. *The implementation of retroactivity procedurally in these cases would be overburdening.*

Judging the effect of the retroactivity of *Mapp* implies not only consideration of the number of past defendants who would raise search-and-seizure claims, but also analy-

sis of the manner in which the claims would have to be examined and tested. With "federal courts already laboring under congested dockets,"[1] the states would doubtless be given the first "opportunity" of reviewing the mountains of claims of pre-*Mapp* defendants [see *Henry* v. *Mississippi*, —— U. S. ——, n. 8, 33 U. S. L. W. 4146 (Jan. 18, 1965); *Jackson* v. *Denno*, 378 U. S. 368 (1964)]. Some defendants' claims might be dismissed upon cursory examination of the court records—for example, if the states were allowed to rule that judgments entered on pleas of guilty should remain closed. Others might be disposed of upon the face of the defendants' applications alone. It may be presumed, for instance, that state courts would be permitted to follow the practice of the federal District Courts, and require clear factual, rather than conclusory, allegations setting forth a violation of constitutional rights before granting a post-conviction hearing on the defend-

1. The following chart shows the increase in post-conviction collateral applications filed in federal District Courts [ADMINISTRATIVE OFFICE OF U. S. COURTS, 1963 REPORT OF THE DIRECTOR 144; 1962 REPORT 130; 1959 REPORT 109; *Henry* v. *Mississippi*, —— U. S. ——, n. 8, 33 U. S. L. W. 4146 (Jan. 18, 1965)]:

fiscal year	*state prisoner habeas corpus*	*federal prisoner habeas corpus*	*28 U.S.C. §2255 motions*
1952	541	406	90
1953	548	346	119
1954	597	395	263
1955	660	362	279
1956	734	429	235
1957	778	339	231
1958	755	408	321
1959	822	553	494
1960	872	767	538
1961	906	860	560
1962	1,232	866	546
1963	2,106	862	595
1964	3,501	—	—

ants' claims. In addition, it would be hoped that the states, like the federal District Courts, would not be required by this Court to entertain collateral attacks from persons who are no longer "in custody" [*cf.* 28 U. S. C. §2241]. If state, or federal, courts were required to extend collateral attacks based on *Mapp* to defendants who have served their sentences, or who received suspended sentences, the chaos would be intensified.

Even if the cases described above could be spared the severest rigors of retroactivity, they would still require hours of work by judges and states' attorneys, and perhaps assigned defense counsel, at the lower court and appellate level.

The remaining cases, which would require more careful examination, probably would comprise the bulk of the retroactivity docket. Judging from collateral applications in other areas than search and seizure, prima facie claims of unconstitutionality are easy to compose, even if factual allegations are required. In the instant situation, however, the available records would rarely provide an answer to the claim. In many cases, no appeal was taken, no trial record will be in the files, and stenographic staffs will have to prepare transcripts. In others, the trial minutes will be available, but inconclusive or silent on the issues raised by the application, including not only the alleged unlawfulness, but also the question whether there was a "search" or "seizure" within the meaning of the Constitution. In both instances, examination of trial records in the light of the defendant's motion papers would be required. Applied to this examination would be imprecise, often cloudy

concepts of the law of search and seizure, including "the troublesome line * * * between mere suspicion and probable cause" [see *Brinegar* v. *United States*, 338 U. S. 160 (1949)], "consent," the permissible scope of a search pursuant to an arrest, and the moment when evidence obtained after an unconstitutional search is "purged of the primary taint" [see *Wong Sun* v. *United States*, 371 U. S. 471 (1963)]. At the present stage of Fourth Amendment jurisprudence, this examination would proceed without guidance from this Court whether the states are free to apply varying versions of the "harmless error" doctrine to these collateral attacks. Even assuming, however, that state courts would be able to adopt the reasonable course of denying post-*Mapp* claims of pre-*Mapp* prisoners if the trial record contains clear proof of guilt without the allegedly tainted evidence [see *Reeves* v. *Warden*, 226 F. Supp. 953, 960-961 (D. Md. 1964); *State* v. *Smith*, 202 A. 2d 669, 675 (N. J. 1964); *State* v. *Beltowski*, 123 N. W. 2d 207 (Minn. 1963), *cert. denied* 325 U. S. 947 (1963)], a great proportion of applications would still require further attention, particularly in "contraband" cases.

State courts might also be permitted to apply procedural rules requiring adequate objection at trial. Even with such sound requirements, however, trial minutes would have to be reviewed to determine the adequacy of the challenge, and the litigation would continue in the appellate courts. In addition, the number of cases in which sufficient objection was found would be large; it may be noted that in direct appeals from pre-*Mapp* trials, state courts have been liberal in discerning the required challenges in the record, and that in many of those cases, in-

cluding *Mapp*, unequivocal objection was entered at trial (see pp. 5-6, *supra*).

Such applications, having passed through the tedious initial scrutiny, would require an evidentiary hearing as to the merits of the constitutional claim. Absent a concession by the state, it could not be assumed, in the instant case or any other, that the record would be conclusive as to the complex factual and constitutional questions raised.

In connection with the hearings, probably the states would be allowed to place the burden of proof of establishing unconstitutionality upon the defendant, as in federal habeas corpus. This would be small comfort to the administration of justice. Police officers and prosecutors would still be required to investigate, and reconstruct as witnesses, events previously considered closed. Most hearings would consume days in court. Calendars would be clogged with the backlog of hearings on pre-*Mapp* searches, and the pending cases of new defendants whose trials would be delayed. The hearings frequently would produce unreliable results. In many cases, passage of time fades memories, renders witnesses and tangible evidence unavailable, and therefore precludes accurate assessment of Fourth Amendment claims, which usually turn on closely contested questions of fact, judged by vague standards of law. By the same token, the defendant would often have an unfair advantage over the state. While the defendant would always be present, vital police witnesses might not. In addition, the defendant might remember more about his case than the officers, who usually have had hundreds of similar cases thereafter.

Some of the claims eventually would prevail, but since these cannot be identified in advance, the foregoing effects on the state judicial systems of allowing all the claims would be the price of the minority that succeeded. The implications of retroactivity of *Mapp* cannot be judged solely by hypothesizing the claims that would be sustained, without considering the foregoing effects of requiring the systems to make the initial inquiry.

4. The federal courts would also be affected.

Retroactivity of *Mapp* would also add to the congestion of the already overburdened federal courts. (see note 1, *supra*). Unsatisfied state prisoners would petition for federal writs of habeas corpus, or certiorari.[2] The federal judiciary, and states' attorneys, would be caught up in relitigating claims already presented to the states.

In addition, a holding of retroactivity would subject past federal convictions to re-examination. Prior to *Mapp*, the federal courts excluded evidence that was obtained

2. The following chart shows the increase in petitions for certiorari filed in this Court [ADMINISTRATIVE OFFICE OF U. S. COURTS, 1963 REPORT OF DIRECTOR 180-181; *Henry* v. *Mississippi, supra*]:

October Term	*In Forma Pauperis*	*Appellate Docket*	*Total*
1953	528	603	1,131
1954	543	626	1,169
1955	583	787	1,370
1956	639	851	1,490
1957	680	716	1,396
1958	772	760	1,532
1959	836	767	1,603
1960	950	718	1,668
1961	1,138	778	1,916
1962	1,213	823	2,036
1963	1,532	—	—

unlawfully [see *Weeks* v. *United States*, 232 U. S. 283 (1914)]. That exclusion, however, was not a constitutional requirement, but a "rule of evidence," based on this Court's "supervisory power over the administration of justice in the federal courts," and for that reason state cases were uniformly distinguished [see *Wolf* v. *Colorado*, 338 U. S. 25 (1949); *Elkins* v. *United States*, 364 U. S. 206, 216 (1960)]. *Mapp* destroyed the distinction when, overruling *Wolf*, it based exclusion directly on the Constitution. Since the Fourth Amendment forbids admission of unlawfully seized evidence in state courts, the same constitutional rationale now applies to federal trials [see *Wong Sun* v. *United States*, 371 U. S. 471 (1963)], and if the exclusionary rule applies retroactively to state judgments because it is "fundamental," it affects previous federal judgments as well.

The federal post-conviction collateral proceedings—habeas corpus and motions to vacate judgments [28 U. S. C. §§2241, 2255]—are generally unavailable to test most claims that could have been raised on direct appeal [*Hill* v. *United States*, 368 U. S. 424 (1962)], and might therefore be inapplicable to a large number of prior federal prosecutions involving search and seizure questions [but *cf.* *United States* v. *Sutton*, 321 F. 2d 221 (4th Cir. 1963)]. Under petitioner's view, however, subsequent decisions that changed the federal constitutional standards could be invoked retroactively by federal defendants, because these new "fundamental" rights were unavailable at the time of trial and appeal.

For example, federal prisoners who were convicted previously in federal courts on the basis of evidence obtained

by state officers through searches, or wiretapping, have sought to reopen their cases because of this Court's subsequent overruling of the "silver platter" doctrine [*Elkins* v. *United States, supra,* overruling *Lustig v. United States,* 338 U. S. 74, 79 (1949)], a result which, in *Mapp,* rose to constitutional status. The circuit courts have rejected such claims, on the ground that *Mapp* is not retroactive [*Gaitan* v. *United States,* 317 F. 2d 494 (10th Cir. 1963); *McLester* v. *United States,* 306 F. 2d 880 (10th Cir. 1962); *Reynolds* v. *United States,* 324 F. 2d 371 (5th Cir. 1963); see also *United States* v. *Zavada,* 291 F. 2d 189 (6th Cir. 1961) (pre-*Mapp* decision that *Elkins* is not retroactive); *Alexander* v. *United States,* 290 F. 2d 252 (5th Cir. 1961) (*semble*)]. Petitioner's argument entails reversal of these decisions, and exposure of countless other past federal judgments to the changing currents of Fourth Amendment jurisprudence.

C. These Burdensome Effects of Retroactivity Would Impair the Administration of Justice, to the Detriment of Defendants with More Urgent Interests.

1. Retroactivity of Mapp would severely impair the ability of the judicial system to assimilate pressing recent changes in criminal law.

Requiring the state and federal courts to entertain and review Fourth Amendment claims of all pre-*Mapp* defendants, for the sake of the relatively few defendants who would eventually prevail, would impair the effectiveness of the judicial system. The immense eruption of complex litigation described above would hinder the important adjustment of the judicial system to broad current changes in many areas of criminal law. Because of these essential

changes in less than a generation, the system of justice that is embodied in the Constitution, as presently interpreted, is younger than most defendants whom the new rules benefit. These transformations have placed sufficiently heavy responsibilities on state—and federal—systems of criminal justice.

The local trial court, appellate court, prosecutor, attorney general, police department, and bar—the latter often prevailed upon by the trial and appellate judiciary to serve with little or no compensation—are already engaged in the complex, costly and time-consuming task of reexamining thousands of past judgments, altering present practice, and planning future procedures, in the light of the new developments. *Gideon* v. *Wainwright* [372 U. S. 335 (1963)], for instance, has voided innumerable convictions, and led to many new trials, for defendants who were not represented by counsel in the past. Provisions for public defenders, assignment of counsel, and other assistance for indigent defendants are being enacted for the future. *Griffin* v. *Illinois* [351 U. S. 12 (1956)] and succeeding cases have required local appellate courts, states' attorneys, public defenders, and assigned private counsel to process appeals from countless previous judgments. Present appellate procedures have been liberalized. *Fay* v. *Noia* [372 U. S. 391 (1963)] added immeasurably to the obligations of the administration of justice, state and federal, by permitting prisoners to raise, under certain conditions, claims that could have been presented earlier, before their cases were closed. Much of the recent torrent of federal habeas corpus petitions by state prisoners (see n. 1, *supra*) must be attributable to *Noia*. These petitions,

although generally without merit, often require burdensome review of court records, and preparation of answering papers. Those with prima facie merit may entail investigations and hearings.

Another broad decision, *Jackson* v. *Denno* [378 U. S. 368 (1964)], will require fifteen states, nine of which had no exclusionary rule before *Mapp*, and several federal circuits to enact new trial procedures for testing voluntariness of confessions. The process has also begun to extend back to previously closed cases. In New York, for example, numerous old cases are going to be re-examined because of the *Jackson* decision, as interpreted by the New York Court of Appeals [see *People* v. *Huntley*, 15 N. Y. 2d ——, N. Y. L. Jour., Feb. 5, 1965, p. 4, col. 1 (Jan. 7, 1965; see also *Butler* v. *Rundle*, —— A. 2d ——, 33 U. S. L. W. 2361 (Pa. 1965)]. Trial and appellate courts, defense lawyers, who will often have to be assigned without compensation, and prosecutors will devote considerable time examining lengthy trial records, and conducting new hearings. Officers in understaffed police forces may be required to testify. Unavoidably, trials of subsequently arrested defendants may be postponed. Also, future trials involving confessions or admissions will be longer and more burdensome to the community. Because the New York Constitution has been interpreted to require a jury trial as to voluntariness, the decision in *Jackson* meant adoption of the cumbersome two-stage "Massachusetts rule" [*People* v. *Huntley, supra*].

These important applications of newly evolved fundamental rights to past, present and future cases would be handicapped by deployment of limited, overtaxed resources

of the bench, bar, police and states' attorneys to the far less pressing matters of disinterring and vainly attempting to reconstruct in the light of *Mapp* countless cases of undeniably guilty defendants, who were represented by counsel, whose confessions, if any, were uncoerced, and whose convictions were entered before the present right of exclusion had evolved. In cases brought by individual defendants, the interpretation of the Constitution in a federal system often requires examination of the judicial system as a whole, judgments as to the priority of public resources, and comparisons among classes of defendants. Unless demonstrably necessary, a situation absent here, assimilation of the fruits of the judicial evolution of recent years should not be restricted by a requirement of digging into past trials to find occurrences now deemed unconstitutional, particularly if, as petitioner suggests, the number of state prisoners able to show that unlawfully seized evidence was used at trial will be "infinitesimally small" (petitioner's brief, p. 26, n. 23).

The foregoing discussion as to the burdens that retroactivity would impose upon the administration of justice clarifies further differences between the instant case, and the retroactivity of the rights to appeal and have trial counsel regardless of indigency, and to test a claim of coercion without a jury. In the latter situations, the disruption of the judicial system entailed by entertaining the claims of previously convicted defendants, while substantial, as was shown above, is significantly less than here. For instance, in those cases the initial inquiry into the primary allegations of unconstitutionality—deprivation of an appeal, absence of counsel, or use of the jury to determine voluntari-

ness—usually can be tested promptly by looking at a few documents. But initial inquiry into the claim that evidence used at trial was produced by an unlawful search would be cumbersome and time-consuming; not only must the trial record be reviewed, but in most cases a hearing would be required thereafter. In addition, the relative ease of verification in the former cases discourages frivolous or dubious applications and means that almost every claim will have merit, a situation absent here. And in cases arising under *Griffin* and *Jackson*, if the court determines, after the simple initial inquiry, that the fundamental procedural right was violated, the second inquiry—to determine whether there was error at trial, or coercion—is generally easier, and more dependable, than the judgment whether, years ago, there was a "search", and if so, whether it was unconstitutional. Trial error appears on the face of the record. Most of the facts as to the claim of coercion will also appear on the trial record, which can usually be reviewed by the original judge [see *People* v. *Huntley, supra*]; additional evidence, if any, would generally come from the defendant, who is always available. The ultimate factual inquiry under *Mapp*, however, as was shown above, would be much more difficult, and generally less reliable. The "limited," two-stage type of retroactivity of *Jackson* v. *Denno* would be unworkable and overburdening in the instant situation.

2. *Retroactivity of Mapp would impair the free development of constitutional law in the future.*

Retroactivity would unsettle not only past judgments in all states and the federal courts, but also future state and federal cases involving search-and-seizure questions.

If this Court agrees with petitioner that all decisions of the Supreme Court interpreting the Constitution should be held retroactive in scope, then future interpretations of the content of the Fourth Amendment, like the exclusionary rule itself, will be applicable to previous cases. In the field of search and seizure, the prospect of forthcoming "fundamental" interpretations is unlimited. "Because there can be no fixed formula, we are admittedly met with 'recurring questions of the reasonableness of searches'. * * * [L]ess is not to be expected when dealing with a Constitution" [see *Mapp* v. *Ohio*, 367 U. S. 643, 653 (1949)].

Among the many challenging "recurring questions" to be reviewed by state and federal courts are the elusive meaning of "probable cause," a concept already transformed from "circumstances which warrant suspicion" [see *Locke* v. *United States*, 11 U. S. (7 Cranch) 339, 348 (1813)] to "reasonable ground for belief of guilt" [see *Brinegar* v. *United States*, 338 U. S. 160, 175, n. 14 (1949)], and one whose application in particular cases often turns on the decision of a divided Supreme Court; the continuing development of standards of probable cause applicable to automobiles, and other modern forms of transportation that were unknown to the founding fathers [see *Carroll* v. *United States*, 267 U. S. 132 (1925); *United States* v. *Bonanno*, 180 F. Supp. 71 (S. D. N. Y. 1960)]; determinations whether flight may be considered an element of probable cause, recently the subject of a 4-4 vote in this Court [see *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *compare Husty* v. *United States*, 282 U. S. 694, 700-701 (1931); *Brinegar* v. *United States*, 338 U. S. 160, 166, n. 7 (1949)]; the sufficiency of a single informant's communications to establish probable cause [see *Wong Sun* v. *United*

States, supra]; the right of police to stop for brief questioning or "frisk" suspicious persons travelling abroad [see N. Y. CODE CRIM. PROC. §180-a; N .H. REV. STAT. ch. 594; DEL. CODE §§1901-1932; R. I. GEN. L. t. 12, ch. 7; *People* v. *Rivera*, 14 N. Y. 2d 441 (1964), *cert. denied* —— U. S. —— (1965); *People* v. *Jackson*, 331 P. 2d 63 (Cal. 1958); *People* v. *Martin*, 293 P. 2d 52 (Cal. 1956)]; the admissibility in a state court of evidence obtained by wiretapping; the required proximity of a search to a lawful arrest; the shifting boundaries of the "curtilage" that is protected from official intrusion; the lawfulness of seizing "evidentiary" material [see *Gouled* v. *United States*, 255 U. S. 298, 309-311 (1921)]; the constitutionality of a police entry without announcement, on which this Court is closely divided [see *Ker* v. *California*, *supra*]; the extent to which voluntary oral statements are "fruits" of a search [see *Wong Sun* v. *United States*, *supra*]; whether the identity of an informer must be revealed to the defendant at a hearing on probable cause; whether the burden of proof at a hearing on the motion to suppress rests with the defense or the state [*compare United States* v. *Rivera*, 321 F. 2d 704 (2d Cir. 1963) *with Wilson* v. *United States*, 218 F. 2d 754 (10th Cir. 1955)]; and whether a "harmless error" doctrine may be applied to search and seizure questions on direct review of judgments, a question still undecided by this Court [see *Fahy* v. *Connecticut*, 375 U. S. 85 (1963)]. The simplicity of the "all-or-nothing" exclusionary rule creates the deceptive allure of retroactivity; it hinders the realization that retroactivity of that simple rule implies eternal retroactivity of all decisions concerning the unclear, complex content of the right that the rule enforces.

The inherent flexibility of the constitutional right that exclusion enforces, combined with the enormous scope of retroactivity—its potential application to numberless past and future judgments in every state and the federal jurisdiction—point to another major harm that retroactivity would inflict on the judicial system. "'[A]ll rules of law and human society are no more than working rules based on human experience, necessarily changing in form and substance as human experience varies in the evolutionary process of life.'"[3] This evolution should proceed unfettered by an arbitrary requirement that, regardless of the circumstances, old cases, properly settled under principles appropriate to that earlier stage in the creative judicial evolution, must continuously be exhumed and re-examined under new principles that are based on a different experience. The crux of most Fourth Amendment issues is current views of reasonableness and fairness, measured by contemporary, not past, experience. Since retroactivity of the exclusionary rule would entail permanent retroactivity of the changing contents of the Fourth Amendment, it would inhibit continuing formulations of the right that are suitable for present cases.

As the discussion earlier showed (pp. 7-8, *supra*), development of the exclusionary rule itself would have been hindered by a presumption of retroactivity. The evolution of the exclusionary rule has ended, but refinement of the Fourth Amendment continues. For example, as was noted above, state and federal courts are presently confronted

3. Letter from Arthur Linton Corbin, quoted in *Bibliography of the Published Works of Arthur Linton Corbin*, 74 YALE L. JOUR. 310, 311 (1964); see CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167 (1921); CARDOZO, THE GROWTH OF THE LAW 53-54 (1925).

with claims that at hearings on motions to suppress evidence, defendants are entitled to know the identity of informers. The standards evolving from these cases depend on each court's delicate balancing of the effect of disclosure on current requirements of effective law enforcement, and the importance of disclosure to the defendant in the context of present-day trial procedures. A few state and federal courts, weighing these practical considerations, have held that the Fourth Amendment requires disclosure under certain conditions [see *United States ex rel. Coffey* v. *Fay*, 234 F. Supp. 543 (S. D. N. Y. 1964), *appeal pending; People* v. *Malinski*, 15 N. Y. 2d ——, N. Y. L. JOUR. Feb. 5, 1965, p. 4, col. 2 (Dec. 19, 1964); *Priestly* v. *Superior Court*, 330 P. 2d 39 (Cal. 1958); *Drouin* v. *State*, 160 A. 2d 85 (Md. 1960); *compare People* v. *Coffey*, 12 N. Y. 2d 443 (1963), *cert. denied* 376 U. S. 916 (1964)]. In the jurisdictions involved in each of the cited cases, however, the prevailing exclusionary rule, state or federal, has been held not retroactive. The spectre of retroactivity would have had an inhibitory effect on the development of rules relating to disclosure.

Similarly, the continuing examination in state and federal courts of the question whether a "harmless error" rule is consistent with contemporary conceptions of the Fourth Amendment would be handicapped by an extraneous matter, the prospect that rejection of such a rule would suddenly require reopening and reversal of the countless federal and state judgments that were affirmed under the rule, both on collateral attack [see *Reeves* v. *Warden*, 226 F. Supp. 953, 960-961 (D. Md. 1964); *State* v. *Smith*, 202 A. 2d 669, 675 (N. J. 1964); *State* v. *Beltowski*, 123 N. W. 2d 207 (Minn. 1963), *cert. denied* 325 U. S.

947 (1963)], and direct appeal [see FED. R. CRIM. PROC. 52(a); *United States* v. *McCall*, 291 F. 2d 859 (2d Cir. 1961); *Woods* v. *United States*, 240 F. 2d 37, 40 (D. C. Cir. 1956); *Gibson* v. *United States*, 149 F. 2d 381, 384 (D. C. Cir. 1945), *cert. denied* 326 U. S. 724 (1945); *People* v. *Parham*, 384 P. 2d 1001, 1004-1006 (Cal. 1963); *State* v. *Fahy*, 183 A. 2d 256 (Conn. 1962), *reversed on other ground* *Fahy* v. *Connecticut*, 375 U. S. 85; *State* v. *Doyle*, 186 A. 2d 499, 507-508 (N. J. Super. 1962); *State* v. *Stevens*, 251 P. 2d 163 (Wash. 1953); *Gross* v. *State*, 201 A. 2d 808, 816 (Md. 1964); *State* v. *Pokini*, 367 P. 2d 499 (Haw. 1961)].

The circumstances requiring, or excusing, an announcement prior to police entry upon a premises to make an arrest or execute a warrant also are being continuously defined, based on contemporary local experience [see *Ker* v. *California*, 374 U. S. 23 (1963); N. Y. CODE CRIM. PROC. §799]. These developments will no doubt form the basis for future conceptions of the Fourth Amendment, and should be free from the shadow of past cases.

Retroactivity in the instant case might also impair the evolution of sound constitutional principles in other fields than the Fourth Amendment. If *Mapp*, with its tenuous claim to retroactivity, is applied to old cases, distinguishing other constitutional decisions would be difficult. State courts, whose contributions to the content of federal due process have been substantial, might be especially haunted by the ghost of old cases. The extension of the right to counsel to noncoercive post-indictment interrogation [see *Massiah* v. *United States*, 377 U. S. 201 (1964)] was founded substantially on new departures by the New York Court of Appeals [*id.* at 204-205; see *People* v. *Waterman*,

9 N. Y. 2d 561 (1961); *People* v. *Meyer*, 11 N. Y. 2d 162 (1962); *People* v. *Di Biasi*, 7 N. Y. 2d 544 (1960)], but the latter court limited its holdings to prospective operation [see *People* v. *Howard*, 187 N. E. 2d 113 (N. Y. 1962)]. In applying right to counsel doctrine to certain pre-arraignment situations [see *Escobedo* v. *Illinois*, 378 U. S. 478 (1964)], this Court expressed approval of principles developed in New York [see *People* v. *Donovan*, 13 N. Y. 2d 148 (1963)], and noted that many states had urged the holding in *Gideon* v. *Wainwright* [372 U. S. 335 (1963) (*amicus* brief of states' attorneys general)]. However, the New York Court of Appeals has not applied *Donovan* retroactively, and the states that called for the holding in *Gideon* urged prospective application. Similarly, the Supreme Court of California has extended *Escobedo* and *Massiah* to pre-arraignment interrogation at which the defendant makes no request for counsel [see *People* v. *Dorado*, 394 P. 2d 952 (Cal. 1964)], but has declined retroactivity of those decisions [see *In re Lopez*, —— P. 2d ——, 33 U. S. L. W. 2390 (Cal. 1965); see also *State* v. *Johnson*, —— A. 2d ——, 33 U. S. L. W. 2375 (N. J. 1965)].

All of these developments in criminal procedure proceed under a reasonable presumption that retroactivity does not necessarily follow if a principle emerges from the cocoon of judge-made rules of evidence into the garden of fundamental rights. "[I]t would be regrettable if a supposed necessity to conform the criteria on habeas corpus to evolving standards of judicial administration and review in criminal trials should in the future prove to be a dogma reflexively inhibiting the evolution of those standards themselves" [Freund, *New Vistas in Constitutional*

Law, 112 U. PA. L. REV. 631, 638 (1964)]. This analysis reveals another distinction between the exclusionary rule and the constitutional rights that have been applied to previously closed cases. Retroactivity of *Griffin*, *Gideon* and *Jackson* will leave no permanent scars on the judicial process, after the finite number of prior cases affected are cleared up. The Fourth Amendment, by contrast, is open-ended, and its continuing refinement would be restricted by eternal retroactivity of the exclusionary rule.

Dramatic evolutions are occurring in American criminal procedure. *Mapp* v. *Ohio*, *Ker* v. *California*, *Gideon* v. *Wainwright*, *Escobedo* v. *Illinois*, *Massiah* v. *United States*, *Fay* v. *Noia*, *Jackson* v. *Denno*, and *Griffin* v. *Illinois* are at the head of a long list of decisions of the last decade in federal and state courts that proclaim broad, often drastic, changes in the requirements of a system of justice. The instant case, and its companion, *Angelet* v. *Fay*, will mark a turning point in this development. In deciding whether *Mapp* v. *Ohio* affects cases tried and closed under the previous "fundamental" law that *Mapp* overruled, this Court will determine to a great extent whether the continuing administration of criminal law is to be fluid, pragmatic and forward-looking, or inflexible and unwieldy, hindered by the past that the movement rejects.

Conclusion

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

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